OCCUPIED ZONE —"A ZONE OF REASONABLENESS"?

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The vocabulary of "reasonableness" invokes a wide margin of discretion that is often needed to temper the excessive rigour of legal rules and to deal with the inevitable problems of over- and under-inclusion associated with application of formal law to individual cases. The acceptability of the use of discretion by a law-applying institution such as the Israeli High Court of Justice is based on the assumption that its preferences and moral sensibilities are broadly reflective of the preferences and sensibilities of the community in which it exercises its jurisdiction. When jurisdiction is exercised in conditions of occupation, however, such consensus cannot be easily presumed. On the contrary, recourse to moral pathos by an institution of the occupying power will appear to normalize its jurisdiction and add an element of hypocrisy to the felt illegitimacy of its possessing jurisdiction in the first place. Moreover, it will undermine the moral and political significance of the fact of the occupation, even diminishing the urgency of bringing it to an end.

> At times, there is more than one way to satisfy the proportionality demand. In such situations a zone of proportionality (similar to a zone of reasonableness) should be recognized. Any means which the administrative body chooses from within the zone is proportional.[1]

I. *Introduction*

No aspect of the recent case law of the Israeli High Court of Justice (HCJ) on the Israeli occupied territories is more striking than its constant recourse to the metaphor

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[1] HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel [2004] IsrSC 58(5) 807, at ¶ 42 [hereinafter Beit Sourik]. An English translation is available in *H.C.J. 2056/04 Beit Sourik Village v. Government of Israel 58(5) P.D. 807*, 38 Isr. L. Rev. 83 (2005) and also available on the Israel Supreme Court website, http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.htm (last visited May 18, 2008).

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of "balancing" to discuss and determine the rights of the protagonists. Thus in the *Beit Sourik* the Court observed that the law of belligerent occupation authorized the military commander in the occupied zone "to maintain security in the area and to protect the security of his country and her citizens." Nevertheless, the Court said that his "authority must be properly balanced against the rights, needs and interests of the local population."[2] Then follows a long list of quotations from the Court's previous jurisprudence insisting that the occupying authorities must maintain a "proper balance" between what it defined as considerations of security on the one hand and the rights and interests of the local population on the other. The Court also wanted to point out that this was not something it had invented itself. On the contrary, the balancing approach was in its view "well anchored in the humanitarian law of public international law," especially Regulation 46 of the Hague Regulations and Article 27 the IV Geneva Convention.[3] These and other provisions of international humanitarian law, the Court said in an attractive metaphor, form "a single tapestry of norms" that may occasionally come to conflict and between which "a proper balance must be found." And then, in a dramatic turn of phrase it asked "What is that balance?"

At that point, the High Court turned to "proportionality." Balancing, it said, was about finding the proper proportion and was not specific to the discretion of military authority under belligerent occupation. Rather, it emanated from "general principles of law, including reasonableness and good faith" as well as what it called a "general principle of international law."[4] To support this view, the Court produced a long list of well-known academic authors, including Theodor Meron, Roslyn Higgins, Judith Gardam, Yoram Dinstein, Adam Roberts, and, to cap it at the peak of *Wissenschaftlich* credibility, the Max Planck Encyclopaedia of Public International Law.[5] Proportionality was a "general problem in the law, both domestic and universal" it said, and added that "its solution is universal."[6] With these opening lines, it defined its job like that of any court, of indeed any administrative body, exercising the mundane business of government.

[2] *Id.* ¶ 34.
[3] *Id.* ¶ 35. In the decision, the Court also relied on the proportionality ground of review in Israel's administrative law (*see id.* ¶ 38). Here I am not going to review that aspect of the matter, however, but will concentrate on proportionality in international law.
[4] *Id.* ¶ 36.
[5] *Id.* ¶ 37.
[6] *Id.* ¶ 36.

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And what does proportionality mean? To determine this, the Court laid out three "tests": the measures must be appropriate to the objective, they must be the least injurious to the rights or interests with which the measure conflicts, and the damage caused, and "must be of proper proportion to the gain brought about by that means."[7] From this outline of the applicable law, the Court went on to consider the legality of the separation fence in the relevant sections of the occupied territories that make the subject of the petition in the *Beit Sourik* case. It is useful to note that—as the Court saw it—there was no disagreement between the applicants and the respondent on the applicable law. Everybody seemed to agree on the "key question," namely "is the route of the separation fence proportionate?"[8] Indeed, the Court assumed that the respondent—the Military Commander—thinks the chosen route *is* proportionate[9] and framed the scope of its judicial review as well. The Court was not called upon to decide a political or indeed a security question. It saw the matter as follows:

> The military commander is the expert regarding the military quality of the separation fence route. We are experts regarding its humanitarian aspects. The military commander determines where, on hill and plain, the separation fence will be erected. That is his expertise. We examine whether this route's harm to the local residents is proportional. That is our expertise.[10]

Then follows the substance of the judgment: fourteen pages, thirty-five paragraphs. An examination of six orders regarding the location of the fence: Is the balance between public security and damage to the local inhabitants correctly struck; are the costs produced in each section proportionate to the benefits? In the end, after having meticulously assessed the proposed placing of each sector of the fence, weighing the pros and the cons, rights and interests, the Court ended up critical of most of the location decisions, and sent the Military Commander back to the drawing board. In a striking move it then turned to the reader—especially the Israeli reader—and wrote a moving epilogue in defence of the *law* against what some of the readers of the judgment might make of the criticisms of the military authorities. "There is no security without

[7] *Id.* ¶ 41.
[8] *Id.* ¶ 44.
[9] *Id.* ¶ 45.
[10] *Id.* ¶ 48.

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law," the Court stated.[11] We are but the law, *La bouche qui prononce les paroles de la loi*, in Montesquieu's vivid image.[12] And the law says : "be reasonable."

One would wish to be reassured. And perhaps the Court itself felt it needed to remind the reader—and maybe itself, too—that what it had undertaken was an act of law, and not a political compromise in a conflict between Israel and the Palestinian villagers. It is quite understandable why the Court would wish to turn to the reader with this kind of epilogue—as understandable as the slight unease this evokes. Of course the men and women sitting there, as the epilogue stresses, are "judges." Of course the judges decided, as the final paragraph says expressly, "according to our best conscience and understanding." What else could be expected? And yet it leaves a taste of the Lady protesting too much. There is some underlying concern, some worry here that is not expressly addressed and that the Court wants to placate it by looking the reader deep into the eye, and with the voice of the utmost sincerity saying "I do mean this seriously." But how reassured are we?

The *Beit Sourik* case was decided at a moment where there was much concern among humanitarian activists and international lawyers regarding the break-down of the law on occupation. After the Second World War there have been only few cases where a military operation has resulted in acknowledged occupation of foreign territory—predominant among them Israel's occupation of Palestinian territory since 1967 and the occupation of Iraq by coalition forces in 2003. There are many reasons for this. Occupation has a temporary character to it that an aggressor wishing to seize territory would wish to avoid. Occupation may also, as Benvenisti has written, become a trap: the target country lets the invader in—and then begins an undeclared and unending guerrilla warfare against it while the occupant finds its hands tied by the laws of occupation. For such and other reasons it may be easier to exercise control by proxy, or carry out operations in the territory without occupying it.[13] In the course of the years, the law of occupation has, like most of humanitarian law, responded to the challenges by shedding its early formalism and turning into a set of pragmatic directives that could be realistically applicable in and out of the battlefield. This Article is about that turn especially as manifested in the jurisprudence of the Israeli Supreme Court, sitting as the High Court of Justice over acts of Israeli authorities in the Palestinian

[11] *Id.* ¶ 86.
[12] *See* DE L'ESPRIT DES LOIS, bk ix, ch. vi (1748).
[13] EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (2nd ed. 2004).

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territory. The argument is that thinking of occupation law as a technique of pragmatic governance by standards of reasonableness presupposes the presence of a minimal community about objectives and preferences that is denied by the occupation. Instead of a mitigation of the harshness of the occupation, proportionality may be felt as an intensification of its attendant violation.

This Article is in six parts. I begin by laying out briefly the problems of discretion ("management") that are often associated with the use of deformalized standards such as "proportionality" and contrast the way the Israeli High Court dealt with them with the relative neglect of such problems by the International Court of Justice (Parts II and III). I then sketch the way "human rights" fail to limit but instead are infected by the same problems (Part IV). Part V examines the turn of the law of occupation to pragmatic management of particular situations. Part VI concludes the Article with a critique of the managerial approach as applied in the Israeli-Palestine conflict.

II. *The Problem with Proportionality*

Many of us learned, already at law school, that recourse to proportionality and its equivalents—reasonableness, equity, good faith and so on—constitute a *testimonium paupertatis* on the part of the lawyer and should be appealed to only in the last instance, if you had nothing else to rely upon. And if you did invoke them, you had better make sure that the audience to which you are arguing before share your moral intuitions, your biases, and preferences. Otherwise, you are surrendering to the lions.

Nevertheless, such vocabulary cannot always be avoided. There is nothing exceptional in the way the High Court used it in *Beit Sourik*. In *Mara'abe,* only slightly thereafter, it conducted an even more meticulous discussion of what proportionality requires—largely in order to distance itself from the recent outright condemnation of the separation wall by the International Court of Justice, insisting that the proper task was to carry out a cool, fact-based assessment of each contested part of the wall's location.[14] In *Mara'abe*, the Court stressed that it was the task of the

[14] *Id.* ¶¶ 59-60, 70, 76; *see also* HCJ 7957/04 Mara'abe v. The Prime Minister of Israel [2005] IsrSC 38(2) 393, ¶ 74, an English translation is *available at* http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf.

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military authorities themselves—and not just of the *ex post facto* judicial reviewer—to weigh Israel's security interest against what it called "the good of the local Arab population"[15] and must "assign the relative weights for the various considerations."[16] In a striking turn of phrase, it characterized the military authority as both an expert on security and the trustee of the Arab population. But the awkwardness of this portrayal—the military authority at the same time a representative of the military interest and the administrator of the rights of the villagers—was to be corrected by the judicial review to be carried out by the High Court itself. Having dismissed the need to follow the blunt illegality line of the International Court of Justice, the Court followed *Beit Sourik* by first ascertaining what damage was caused to the residents of the *Alfei Menashe* enclave by the wall and whether that damage was proportional to the security objectives through the "three subtests" that its approach seemed to call for, namely rational connection to objective, least injurious means and the intensity of the injury.[17]

In these decisions, proportionality is not simply a marginal corrective to the law on occupation but the heart of it, the *Grundnorm* against which the activities of the occupation authority must be measured. Of course, its importance extends far beyond specific questions about the construction of the wall. For example, in the *Early Warning* case of June 2005,[18] proportionality was applied to a procedure under which Israeli security forces were authorized to use local Palestinian residents as intermediaries to give warning of possible injury to suspects that were to become arrested by the Israeli military. This procedure had been challenged as involving the use of "live shields" in situations of some danger to civilian lives. To the question "is the army permitted to make a local resident relay an 'early warning' to a wanted person in a place besieged by the army, against his will?" the High Court replied that "the solution to our question required a balancing between different considerations."[19] On the one side, it stated, was the value of human life—namely the interest to arrest the suspect without the need to use violence that might be dangerous to him or individuals in the area of operations—on the other side, "the occupying army's duty to safeguard the life and dignity of the local civilian sent to relay the warning."[20] In

[15] *Id.* ¶ 24.
[16] *Id.* ¶ 29.
[17] *Id.* ¶¶ 110-16.
[18] HCJ 3799/02 Adalah v. The Central Command, IDF [June 23, 2005] (unpublished), *available at* http://elyon1.court.gov.il/Files_ENG/02/990/037/a32/02037990.a32.pdf.
[19] *Id.*
[20] *Id.* ¶ 23.

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President Barak's voice, the Court held that "in balancing between these conflicting considerations ... the considerations in favor of forbidding the army from using a local resident prevail."[21] He received this from international humanitarian law rules such as those prohibiting the use of local residents as part of the war effort, the need to separate civilians and soldiers, the inequality between the occupying force and the residents and lack of information of the danger involved.[22] But that these and other considerations might have pointed to the other direction is anxiously affirmed in the concurring opinion of Vice President Cheshin, his opinion playing somewhat the role of the epilogue in *Beit Sourik*. How difficult the decision is, how important are all the considerations! And yet, painfully, a choice has to be made, a choice that, whatever it is, Cheshin writes, will be regretted by him at some point later. Of course, this may always be the case—most judges would affirm this—but now there is a need to write it down here, perhaps to console, and to reassure.

Such concerns were no less evident in the *Targeted Killing* case of late 2006 that had to do with the practice of using security forces to assassinate suspected terrorists in the occupied territories. By the end of 2006, nearly 300 such killings had taken place while around 150 civilians lost their lives in this connection.[23] Accepting that the practice was indeed justiciable, the Court assessed its merits through a proportionality test analogous to that in *Beit Sourik* and *Early Warning*: "The rule is that combatants and terrorists are not to be harmed if the damage expected to be caused to nearby innocent civilians is not proportionate to the military advantage in harming the combatants or terrorists."[24]

The Court added that this kind of balancing "is difficult when it regards human life. It raises moral and ethical problems."[25] But it remained silent about what those problems were or how to deal with them. Most legal problems involve moral and ethical issues without there being a need to mention this expressly. Here, I suspect, the Court wished to signal its awareness of the weakness of its technique and instead, for a moment, readdress the audience to which it was speaking as a moral community that would understand the tragic heroism of its position. With this, it could then turn

[21] *Id.*
[22] *Id.* ¶ 24.
[23] HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel [Dec. 11, 2006] (unpublished), ¶ 2 [hereinafter *Targeted Killing*].
[24] *Id.* ¶ 46.
[25] *Id.*

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back to law and conclude that "[d]espite the difficulty of that balancing, there is no choice but to perform it."[26]

Balancing and proportionality are the heart of the law on occupation, of international humanitarian law, but perhaps even of every kind of law in a globalized world.[27] The HCJ argued this using mainstream international case-law and literature. Every text-book on international humanitarian law, every learned article, is today written in the realist-pragmatic genre of reasonableness. But even if this were not so, it would be hard to deviate from what appears as its compelling rationality.[28] Imagine the contrary case: bright-line rules laying out unequivocally the powers of the occupant and the rights of the population. These rules would be based on past practices but would have to apply in an unknown future. They would thus easily extend to cases we would not wish them to extend to while not applying to situations for which their rationale might be relevant.[29] Say, for example, that the Geneva Convention provided that the occupying power shall not prevent the use of personal vehicles by the population. The purpose of this rule would be to enable private communications while allowing the occupier to confiscate armoured or other military vehicles. Yet such a rule would be defective from the perspective of both of its rationales. Nothing is easier than transforming a private car into a bomb—and there is no reason to entitle the occupying power to seize trains and buses. A crude example but I hope the point is clear. The makers of humanitarian law have no means of knowing what kinds of activity might threaten the occupying force; or what types of action by the force might create an intolerable burden on the population. It all depends. This is why the

[26] *Id. In fine.*

[27] The turn to reasonableness and proportionality (in contrast to "hard" rules) in national laws is one aspect of what appears as the increasing complexity of the social context that legal systems are expected to regulate. For one discussion of its projected extreme consequences, see TIMOTHY O'HAGAN, THE END OF LAW? (1984). More recently, pressures from "globalization" are understood as significant contributors to this. *See, e.g.*, ANDRÉ-JEAN ARNAUD, CRITIQUE DE LA RAISON JURIDIQUE. 2 GOUVERNANTS SANS FRONTIÈRES. ENTRE MONDIALISATION ET POST-MONDIALISATION (2003). However, the emphasis in this Article is not on the technical details of "proportionality" under domestic administrative law but under international law. For a recent overview of the theme in international law, see JUDITH GAIL GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE (2004).

[28] As pointed out in Moshe Cohen-Eliya, *The Formal and the Substantive Meaning of Proportionality in the Supreme Court's Decision Regarding the Security Fence*, 38 ISR. L. REV. 264 (2005).

[29] I have made this argument in some length in regard to the suggestion for criteria of "humanitarian intervention" in *The Lady Doth Protest too Much: Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159-75 (2002). The best overall statement of these problems remains FREDERICK SCHAUER, PLAYING BY THE RULES. A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 31-34, 47-52, & *passim* (1991).

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occupying power is prohibited from destroying property in the zone "except where such destruction is rendered absolutely necessary by military operations."[30] This provision was considered recently in the *Hass* case where the HCJ made this point:

> The military commander is required by international law to exercise very scrupulous consideration. He is entitled to do this where essential military-security needs so demand, and when the requisition balances proportionately between the importance of the military need and the extent of the damage that is likely to be caused to the property owner by the requisition.[31]

But even if open-ended formulations such as "necessary," "reasonable," or "necessity" were not written into the relevant standards we would still have to read them into those provisions owing to the functional nature of international humanitarian law. Why are the four Geneva Conventions there? Well, as every history of humanitarian law informs us: in order to provide for the security of the occupying power while safeguarding the essential interests of the local population. If some of their provisions go against either of those objectives there is no reason to apply them. Surely, as we have learned to say, international law is no suicide pact. It is followed because it safeguards valuable objectives. If it did not, but instead contributed to undermining those objectives, what possible reason would there be to follow them?

In a complex environment, as Max Weber once pointed out, law becomes deformalized; bright-line rules do not work.[32] We need to take into account the specific circumstances of the situation so as to attain the objectives of the law *in that case*.[33] This means that we must seek out the relevant interests as they appear in the context, and measure the suggested interference against the harm. Of course, there is something disturbing about the uncontrollability of such calculations—indeed the choice of what there is to be calculated in the first place. In *Beit Sourik*, one contested issue concerned the settlers. Should their interests also be included? And

[30] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 53, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

[31] HCJ 10356/02 Yoav Hass v. The IDF Commander in Judea and Samaria [2004] IsrSC 443 53, at 66, ¶ 9.

[32] *See, e.g.*, Max Weber, On Law and Economy in Society 303-21 (Max Rheinstein ed., 1954).

[33] *See, e.g.*, the discussion in Antonio Cassese, *On Some Merits of the Israeli Judgment in Targeted Killings*, 5 J.Int'l Crim. Just. 342 (2007).

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what counts as collateral damage—ruined houses and expectations, bitterness and hatred? Why not? But who can count them, what is their appropriate measure? It is as if the lawyer were pulled, reluctantly but inexorably, with the very force of her own impeccably professional arguments, ever deeper into some quicksand of bottomless relativist morass.[34]

The problem of principle, I think, concerns the significance of a law that says that the relevant considerations must be balanced proportionately. What do the parties, or indeed the community, learn when they hear this? As if they did not know that the good decision must be the reasonable, proportionate decision. They came to the law because they disagreed on what this would mean. If people were able to agree on what is reasonable or proportionate, no courts, or law would ever be needed. If the law that comes to us now, only refers further to proportionality, good faith, equity, or reasonableness, then it presumes the presence of the conditions the absence of which constitutes the assumption on which the law was created.

Now of course, things may not seem altogether that dramatic. Perhaps courts have some special ability, a competence created out of routine, say, that enables them to assess proportionality in a somewhat more reliable way than ordinary citizens would. In *Beit Sourik*, the HCJ aims to assure us by the vocabulary of "testing," invoking the image of scientific experimentation, painstaking work at technical laboratories with cutting-edge equipment, computer screens blinking, needles jumping, men and women in white coats carrying clipboards , nervously anticipating the results; does the medicine work, is the hypothesis corroborated? The High Court, too, carries out three different "tests"—yet we ask, after a moments reflection—why three, and not four, five, six? And what is the meaning of, for example, the third test that looks for the

[34] These dilemmas are anxiously stressed in the meticulous analysis in Amichai Cohen & Yuval Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case*, 5. J. INT. CRIM. JUST. 310 (2007) where the authors point to the "indeterminate nature of the proportionality test" and the "ambiguous and subjective considerations involved," concluding that "it is much easier to formulate the principle in general terms than it is to apply it in a particular set of circumstances," *id.* 314, 316. I doubt whether this is helped by distinguishing between the "formal" proportionality of the first two subtests (rational objective and least harmful effect) that would be proper for a *court* to make from "substantive" proportionality (interest-comparison) that would belong in the realm of the *legislative*, as suggested by Cohen-Eliya, *supra* note 28. Any legislative "balance" will have to take the form of a *general* rule that would need to be applied to a particular case in which the relative intensity of the juxtaposed values would again need to be re-assessed by the law-applier (i.e., a court).

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"proper proportion" under which "costs" ought to be weighed against the "benefits."[35] Does this not just push the court one step further—to where it would have to give an account of the test that a consideration needs to pass in order to qualify as a "cost" or a "benefit" plus the scale that it proposes to use so as to attain a comparison? How the items are identified, calibrated to as to make them comparable, and finally measured so as to carry out the weighting?

One feels almost embarrassed to ask such questions. Perhaps it is unkind to ask them. "What do you mean—don't you understand that balancing, proportionality, costs and benefits and all that are not meant to be taken *that* literally! Of course we know that legal decision-making is not like conducting tests in a chemical laboratory. Who are you with your mock pretence of literality—good soldier Svejk? What would you do in our place? Surely it is better to lay out openly what one feels are the relevant considerations, and then choose among them, even if the final choice remains somewhat a mystery. Surely it is better than just deciding and giving no explanation at all!" This, I think is the message of the epilogue in *Beit Sourik,* the concurrent opinion in *Early Warning* as well as the voice of moral conscience adopted by Justice Barak in *Targeted Killing*. Of course our tests and calculations are not binding in any absolute way. But they are still serious and we take them seriously. And if there still remains a mystery about how it all comes together we write an epilogue or a Separate Opinion or adopt a language of moral awareness to underline our status as men and women of conscience, our legal work involving the calling—*Beruf*—that Weber grasped as the last straw before his heroic descent into full relativism.

And so the Court pulls itself from the quicksand of ever receding argumentative chains onto firm ground like Munchhausen, by his own hair, or like Luther and Wittgenstein, by observing "here is where I stand. I can do no other." Like recourse to the calculating reason of balancing and proportionality, this, too, is a *posture* but a different one, the sign of humble commitment to the profession as a vocation. Yet it relies, for force and effect, on a certain sympathy in the audience, on the willingness to interpret this combination of technical professionalism—proportionality, testing and so on—and tragic authority—acknowledgment of the painfulness of the decision—as the voice of legitimacy. For an unsympathetic audience, it will appear as indeterminate wordplay and pompous self-aggrandizement.

[35] *Beit Sourik*, *supra* note 1, ¶ 59. This is what the Court repeatedly calls proportionality *stricto sensu*. *See, e.g., Targeted Killing*, *supra* note 23, ¶ 44.

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III. *Policy and Conviction?*

So recourse to proportionality seemed troubling because it cannot be pushed in the deductive frame in which lawyers often think their job. But hold on—nobody has *really* believed in deductive legal reasoning for a long time. We are all realists now. We accept that policy must be part of the job of law. Although the HCJ uses the deductive form, what takes place underneath is a policy choice. But, we think, this is not exactly the same as a political choice. Political choice is governed by ideology, passion, desire, and so on. "Policy" is something clearer, more objective, or transparent, an objective that can be descriptively accredited to the law-makers, the sense of the legislative compromise expressed in an objective the law *itself* aims to attain.[36]

Something like this might be thought to explain the—indeterminate but still predictable—difference between *Beit Sourik* and the advisory opinion of the International Court of Justice (ICJ) in the *Construction of a Wall in the Occupied Palestinian Territory* (2004).[37] While the policy in the former was formulated in the narrow terms that accepted the idea of the security fence while allowing challenges to its particular location, the ICJ apprehended the relevant law in view of a wider juxtaposition between Palestinian right of self-determination and Israeli security. Interpreting it in terms of the entrenchment of Israel's illegal settlement policy, it viewed the wall in blanket terms as illegal. The governing policy was self-determination, limited by whatever conditions verifiable security concerns might pose to it. Both as a part of the illegal settlements policy and as impeding the right of movement of the Palestinians, the wall violated it.[38] True, international humanitarian law allowed "account to be taken of military exigencies in certain circumstances."[39] But it did not balance. It conducted no tests. The ICJ simply stated, *ex cathedra*, that it "is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Genera Convention were rendered absolutely necessary by military operations."[40] The infringements "cannot be justified by military exigencies

[36] DUNCAN KENNEDY, CRITIQUE OF ADJUDICATION. FIN DE SIÈCLE 97-156 (1996).
[37] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶¶ 122, 134 (July 9) [hereinafter *Wall* Advisory Opinion].
[38] *Id.* ¶¶ 122 & 134.
[39] *Id.* ¶ 135.
[40] *Id.*

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or by the requirements of national security or public order."[41] In a one-paragraph statement on the doctrine of necessity, the ICJ only stated its conclusion, namely that it was "not convinced that the construction of a wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction."[42]

The difference with the style of Israel's High Court is striking. The ICJ delineated a policy of self-determination behind the law and considered the wall as a deviation from it. That the deviation was not justified is not argued, only assumed. In three places, the ICJ states simply it is "not convinced." It was in a tight spot. For what could it have said authoritatively, and against Israeli data, about the facts on ground and their appreciation?[43] What tests could it have applied that could have overruled those of the Israeli Court? And had the conclusion been that the wall was all right—who would have listened? Two styles, equally authoritative, equally open-ended, equally persuasive or unpersuasive, depending on the audience, and on what we think as crucial and what marginal in the situation. Is the starting-point self-determination or security, Palestinian rights or military needs? The Israeli Court looks at the ground, and sees a military official and a Palestinian resident—the ICJ looks at the map, and sees Israel and Palestine: two contexts, two ways to frame an event, two constructions of "policy."[44]

IV. *Into Human Rights?*

The turn in Western law to reasonableness, balancing, and policy has created a counter-strategy. Not everything is fluid. Some things must remain non-negotiable. Old people may not be removed to old-age homes even if that was, on balance, the

[41] *Id.* ¶¶ 135 & 137.

[42] *Id.* ¶ 140. For appropriately critical analysis of the ICJ's economy of argument, see David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law,* 99 Am. J. Int'l L. 98-100 (12005); Yuval Shany, *Capacities and Inadequacies. A Look at the Two Separation Boundary Cases*, 38 Isr. L. Rev. 134-36 (2005).

[43] For surely it had at least unofficial access to such data despite Israel's absence from The Hague. In any case, much of it was included in the *Beit Sourik* case, *supra* note 1, even as it was rendered only a few days before.

[44] *Cf.* Daphne Barak-Erez, *Israel: The Security Barrier—Between International Law and Domestic Judicial Review*, 4 Int'l Const. L. 547-48 (2006).

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most cost-effective way to care for them. They have a right to live at home. Ethnic background may not be a criterion for employment even if we know that certain applicants qualify better than other applicants. Job applicants must have a right of being treated equally. The turn to rights is part of the liberal response to the critique of administrative balancing. Law ought not to remain a matter of what happens to be the preferred policy of the deciding institutions: Israel or The Hague. Rights are needed for control and impartiality.

That human rights law applies in armed conflict and occupation has now been affirmed not only by human rights treaty bodies—including the Human Rights Committee[45]—but also the International Court of Justice in the 1996 *Nuclear Weapons* and the 2004 *Wall* opinions as well as the 2005 case on *Armed Activities* (Congo v. Uganda).[46] The jurisprudence of the European Court of Human Rights (ECHR) on the applicability of the European Convention under military occupation has fluctuated. Nevertheless, the Court recently affirmed that the Convention will apply to military activities of a Party—and I quote:

> [W]here, as a consequence of military action—whether lawful or unlawful—that State in practice exercises effective control of an area outside its national territory .... The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercises directly, though its armed forces, or through subordinate local administration.[47]

[45] Thus, General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) states that:

> [A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party... the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

[46] *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 24 (July 8); *Wall* Advisory Opinion, *supra* note 37, ¶ 106; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶¶ 215-221 (Dec. 19).

[47] Issa v. Turkey, 41 Eur. Ct. H.R. 27 (2004), ¶ 69.

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At least as far as the Strasbourg Court is concerned, the Convention will apply in belligerent occupation.[48] The same seems to be true also for the Inter-American Court of Human Rights that affirmed in 2002 that the Guantanamo detainees came under the Convention because they were "wholly within the authority and control of the United States Government."[49] The position of the Israeli High Court of Justice has been more equivalent—sometimes applying human rights arguments, sometimes limiting itself to humanitarian law.[50] Yet, as the HCJ stated in *Mara'abe*, formal applicability is one thing—but the Military Commander is regardless called upon to safeguard the human rights of the population.[51]

I want to make two points about rights. First, they do not lead beyond balancing but instead on closer look reaffirm the need for it. In a famous case the ECHR examined the use of lethal force in law-enforcement activities and found the applicable standard to be about proportionality. In its judgment on the use of force by British soldiers on Gibraltar against suspected IRA members, the Court famously stated that whether this involved a violation of rights depended on: "... whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence [and] whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, the use of lethal force."[52]

Also the Israeli Court stressed the relativity of human rights in *Mara'abe*, the need to adjust them with the view of the rights of others and the public interest. And the Court integrated the balancing exercise directly into the jurisdiction of the occupying authorities themselves. Because they represented the public interest in the occupied territory, they "must create a balance between the conflicting considerations."[53] Rights will not lift the unease created by loose standards of reasonableness and proportionality. They are embedded in human rights themselves: "The result of that

[48] *But see also* R. (on the application of Al-Skeini) v. Secretary of State for Defence, [2004] EWHC 2911; Al Skeini v. Secretary of State for Defence, [2005] 2 WLR (QBD). But also critique in Philip Leach, *The British Military in Iraq— the Applicability of the Espace Juridique Doctrine under the European Convention on Human Rights*, 448-458 Pub. L. (2005).

[49] Detainees at Guantamo Bay, Cuba, Request for Precautionary Measures, Inter-Am. C.H.R. (March 13, 2002), *reprinted in* 41 I.L.M. 532.

[50] For analysis of the expansive role of human rights arguments in occupation situations, see Aeyal Gross, *Human Proportions: Are Human Rights the Emperor's New Cloths of the International Law of Occupation*, 18 Eur. J. Int'l L. 9 (2007).

[51] *Mara'abe v. The Prime Minister of Israel*, *supra* note 14, ¶ 18.

[52] McCann v. United Kingdom, 21 Eur. Ct. H.R. 97, ¶ 194 (1995).

[53] *Mara'abe v. The Prime Minister of Israel*, *supra* note 14, ¶ 29.

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balancing is that human rights are protected by the laws of armed conflict, but not to their full scope .... This balancing reflects the relativity of human rights, and the limits of military needs."[54]

But there is another weakness in human rights that may be even more important, namely that if there is no authoritative list of such rights, then every interest may come to demand the strong protection rights offer and this will rewrite every social conflict—including military conflict—as a conflict of rights; my rights to security against your right to freedom, typically. In the end, it is not so much that rights must be balanced against each other, but that they lose their critical voice, and become an aspect of the regular government of things.[55]

Let me illustrate what I mean using the *Al-Jedda* case from the High Court of Justice in Britain in 2005.[56] The claimant—a dual citizen of Iraq and Britain—was detained by British forces in Iraq for ten months without being charged. He contended that the detention was in breach of his rights under the British Human Rights Act of 1998, based on the European Convention on Human Rights. The Court specifically tested the legality of the detention against what it called "the context of international human rights law."[57] However, the Court read the detention itself as a human rights measure in a way that enabled it to bypass the question of conflict:

> The Security Council, charged as it is with primary responsibility for maintaining international peace and security, has itself determined that a multinational force is required. Its objective is to restore such security as will provide effective protection for human rights for those within Iraq. Those who choose to assist the Security Council in that purpose are authorized to take those steps, which include detention, necessary for its achievement.[58]

In other words, the Court refused to think in terms of a conflict between security and human rights. Security was itself a human right so that there was nothing to

[54] *Targeted Killing*, *supra* note 23, ¶ 22.
[55] I have discussed the process of deformalization of rights further in my *The Effect of Rights on Political Culture*, *in* THE EUROPEAN UNION AND HUMAN RIGHTS 99 (Philip Alston ed., 1999) as well as in the more recent LA POLITIQUE DU DROIT INTERNATIONAL175 (2007).
[56] Al-Jedda v. Sec'y of State for Defense, [2005] EWHC 1809.
[57] *Id. see* ¶¶ 94 *et seq*.
[58] *Id.* ¶ 104.

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balance. Let me quote again: "[f]or the purposes of restoring and maintaining that peace and security without which there can be no human rights within Iraq, the Security Council has authorized such detention as is necessary for imperative reasons of security in accordance with Article 78 of Geneva IV."[59]

Although human rights won the day, the policy preference of the regular right-activist did not. And why would it? If freedom is a right and security is a right, then activism for human rights is mere shouting—and the only question remains who can shut the other up.

An analogous problem appears in *Mara'abe*. As the HCJ allocated the balancing exercise to the military authorities themselves, it re-described those authorities as experts in both security and Palestinian needs—something it had apparently denied in *Beit Sourik*.[60] It is not difficult to understand why it would not take its own prior view in absolute seriousness. This would have institutionalized an opposition between the military and the judiciary that would have undermined the authority of both. Just as the HCJ could not pretend that it was not actually analyzing Israeli security as part of the weighing exercise, it could not deny the intrinsic humanitarian implications of the jurisdiction of the Military Commander. The pragmatism of the Court, and of modern law, made human rights and security suddenly seem indistinguishable. Any action is always an act of security and human rights and whether we describe in the former of the latter vocabulary no longer really matters. They emerge from a single technique of governing a complex society or a situation and will be about weighing and balancing, seeking out the pros and the cons.[61] The question is no longer what technique or vocabulary one should use but who should decide. Soldiers or lawyers? Liberals or conservatives? Israeli or Palestinians?

V. *Occupation and Sovereignty*

The law of occupation has been subject to much recent criticism as being out-of-date. In this section I will try to articulate the intuition behind that critique and the way it

[59] *Id.* ¶ 108.

[60] *See* the quote from *Beit Sourik*, at *supra* note 10.

[61] On this, *see especially* David Kennedy, The Dark Sides of Virtue. Reassessing International Humanitarianism 266 (2005).

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leads into a further deformalization of the relevant law. We have seen that there are no bright-line rules governing the acts of the military occupier, or the rights of the local population. Everything is a matter of more or less. The same is true of the legal category of "occupation." What used to be a relative straight forward formal status, contrasted to full formal sovereignty, has become blurred. Not because of somebody's fault but owing to the liquidity of the social world itself.

The regime of belligerent occupation with bright-line rules arose as a technique for managing the European territorial order after the French revolution.[62] The revolutionaries had claimed to make war not for annexation or glory but in the interests of the populations themselves. War was to be a war of liberation to collapse the monarchic system. Under this view, there would be no tension between the occupier and the population and nothing to balance. The occupier is the enlightened monarch who, knowing what is good for the population, has absolute authority. Something of this is visible in the recent occupation of Iraq. But this is not the law of belligerent occupation as it was written into the 1907 Hague Rules[63] and the 1949 Geneva Conventions.[64] Under this law, the declared motives of the belligerent have no normative force. War is a fact and occupation a temporary status between full warfare and sovereignty, protecting the formal integrity of both. The victorious power is entitled to exercise *de facto* authority on the territory it has captured but may not change the regime in the occupied area. The constitutional status will remain until the fate of the territory is permanently decided in a peace treaty. Occupation law rewards military victory and protects the territorial order.[65] According to Article 43 of the Hague Regulations of 1907:

[62] *See* further Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUR. J. INT'L L. 721 (2005).

[63] Convention Respecting the Laws and Customs of War on Land (Hague, IV), Oct. 18, 1907, 36 Stat. 2277, 2306, 205 Consol. T.S. 277, 295 [hereinafter Hague Regulations].

[64] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter First Geneva Convention, Second Geneva Convention, and Third Geneva Convention] and the Fourth Geneva Convention, *supra* note 30.

[65] Like the rest of 19th century law, this was limited it in two ways. First, it was applicable only in European territory. Late 19th century international law books were full of justifications for why the barbarity of the non-Europeans—in particular their lack of understanding of the intricate rules

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> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and [civil life], while respecting, unless absolutely prevented, the laws in force in the country.

The rule projects occupation as an incident of a conflict between two sovereigns. Its point is to strike balance: on the one side the sovereign authority of the occupying state, on the other, the sovereign rights of the state under occupation. Expressions such as ensuring "as far as possible" and respecting "unless absolutely prevented" in the above quotation recognized the legitimacy of both sides and looked to the future establishment of peace between them. It presumes what Benvenisti has called a "minimal concept of war,"[66] a war waged by professional armies distinct from civilian activities and that the occupying power has no other interest in the territory than the security of its troops and the orderly conduct of the war.

Already events of the First World War showed the limits of this view. Most 20th century war has been ideological and total. All resources of society become part of the war effort. Full political and economic reorganization may be needed to ensure the interests of the occupant. In such a situation, the population does not experience the occupant as a neutral and temporary administrator and feels itself violated. Moreover, it will do all it can to undermine the occupation and thus a cycle of repression is created.[67] By the end of the Second World War, despite their formal recognition by the Nuremberg Tribunal, the Hague Regulations was undermined by non-application.[68]

The Fourth Geneva Convention of 1949 moved from a formal to a functional world. No longer concerned with rights of the sovereigns, the law provided for the welfare of populations finding themselves "in the hands of the party to the conflict or the Occupying Power of which they are not nationals."[69] The occupying power may

of civilized warfare—prevented the application of those rules to them. *See, e.g.*, John Westlake, Vol. II: War, International Law 87 (2nd ed. 1910). Second, it was valid only in formal wars between European States and was based on the assumption of the complete formal equality of the belligerents.

66 Benvenisti, *supra* note 13, at 26-29.

67 The complete assumption of all authority in Belgium and the reorganization of Belgian political and economic life by Germany in 1914-1918 would become, Benvenisti notes, "on the whole, a representative rather than unique experience," *id.* at 47.

68 For an overview of the practices of WWII, see *id.* at 60-98.

69 The Fourth Geneva Convention, *supra* note 30, art. 11.

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introduce whatever changes in the government of the territory it sees appropriate, provided that persons are not "deprived of the rights provided by" the Convention.[70] This is a "realistic" law, no more obsessed by formal status. The belligerent occupant becomes a trustee of the population, charged to administer the territory in view of the interests of the inhabitants. Developments in the past two decades increasingly support this. Wars are no longer wars of annexation but for protecting human rights, saving failed states and "regime change," involving multilateral (Western-led) forces acting often with the UN's blessing. For advocates of this type of warfare: "The modern occupant temporarily acts as a de facto sovereign of the occupied territory."[71]

This grounds the instability of the modern law on occupation. When the tasks of the *de facto* authority are characterized as maintaining stability and policing the welfare of the population, it becomes impossible to distinguish temporary occupation from the commencement of sovereignty—or indeed sovereignty from an (merely) extended occupation. This is the obverse of the law's slow move from bright-line rules to broad social objectives such as "ousting tyrants," instituting "democracy," and realizing "human rights." The status of occupation as a distinct kind of rule between war and sovereignty disappears: something of both is involved in it, namely continued war against the old sovereign and reconstruction of the political institutions ostensibly in the peoples' interest. The question about the origins of new rule in an initial act of violence can be swept aside: after all, which sovereign did not begin its career in blood?

The loss of a bright line between occupation and sovereignty can be witnessed also from the opposite side, the shift of focus from formal sovereignty to how it is *exercised*. Most of us today think of sovereignty functionally, deferring to its objectives—provision of security and welfare. In the leading case on territorial sovereignty, the *Island of Palmas* from 1928, the arbitrator only tried to find out who had exercised effective power on the island. This was not because he was bedazzled by power, but because only it enabled the protection the rights of the inhabitants and the interests of the other states in that territory.[72] Or think about the debates in the UN and elsewhere since 2001 on the "Responsibility to Protect"—the widely supported Canadian initiative to rethink the boundaries and force of sovereignty in terms of responsibility to the local population. It is now commonplace to say that sovereignty

[70] *Id.* art. 47.
[71] Grant T. Harris, *The Era of Multilateral Occupation*, 24 BERKELEY J. INT'L L. 19, 21 (2006).
[72] Island of Palmas (U.S. v. The Nether.), 2 R. Int'l Arb. Awards 869 (Perm. Ct. Arb. 1928).

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ought not to shield tyrannical governments, that it is neither a mantra nor a taboo. We respect if it brings us to valuable objectives, above all security, rights, and a structure of ruling that defers to Western vocabularies of democracy and the role of law. If sovereignty itself were to endanger those objectives, then as Western interveners in Kosovo in 1999 argued, there is surely no reason to respect it.[73] One need not be a militarist to think in this way. Functional interventionism underlies much of human rights law, and international trade and environmental law, for example. All of these lift the formal veil of sovereign authority so as to enable ruling populations outside the formal frame of sovereignty. For its proponents, this kind of rule: "unbundles sovereignty and returns it piecemeal in accordance with the manner and time frame produced from negotiations between the occupying power, on the one hand, and, on the other, various states, international institutions, and select international elites and/or expatriates from the occupied territory."[74]

Nor is this any postmodern extravaganza but respectful of the Western political tradition since Jean Bodin and the rise of natural jurisprudence, the Hobbesian dialectic of protection and obedience. Sovereignty did not arise as a philosophical invention but out of Europe's exhaustion from religious conflict. The science of modern government began in the 16th century with an effort to guarantee *conservatio status* and *tranquillitas reipublicae*. Within a century, the objective of territorial security had been supplemented by the goal of the welfare of the people, *Glückseeligkeit* as 18th century German *Polizeywissenschaft* conceived it.[75] One need not go further than Samuel Pufendorf's *De jure naturae et gentium* of 1672 to find the unexceptional statement "[t]he general law for supreme sovereigns is this: 'Let the people's welfare be the supreme law.'"[76] Without power, there can be neither security nor welfare. Without power, the bond between protection and obedience is broken. The sovereign ceases to be such.[77]

[73] For a careful analysis of the Western arguments, see Olivier Corten, *Les ambiguités de la référence au droit international comme facteur de légitimation portée et significantion d'une déformalisation du discours légaliste, in* OLIVER CORTEN & BARBARA DELCOURT, DROIT, LEGITIMATION ET POLITIQUE EXTERIEURE: L'EUROPE ET LA GUERRE DE KOSOVO 223-59 (2000).

[74] Harris, *supra* note 71, at 23.

[75] *See, e.g.*, PETER PREU, POLIZEIBEGRIFF UND STAATSZWECKLEHRE. DIE ENTWICKLUNG DES POLIZEIBEGRIFFS DURCH DIE RECHTS—UND STAATSWISSENSCHAFTEN DES 18. JAHRHUNDERTS (1983).

[76] Samuel Pufendorf, *On The Law of Nature and of Nations*, Bk vii, ch 9 § 3, *in* POLITICAL WRITINGS 242 (Carr & Seidl ed., 1994).

[77] IAN HUNTER, RIVAL ENLIGHTENMENTS. CIVIL AND METAPHYSICAL PHILOSOPHY IN EARLY MODERN GERMANY 156, 158-63 (2001).

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The Geneva system, like modern law, is anti-formalist: "Never mind status. All that counts is the existence of de facto power, whatever its origin or objectives, available to be used for good purposes. Do not bind yourself beforehand; react to facts as they arise on the ground. Status should not constrain but liberate you." The allied occupation of Germany after the Second World War created a lively debate about where sovereignty stood, and what was the position of the allied powers. The distinction between sovereignty—that continued to exist in Germany—and the exercise of sovereign rights—that was vested in the Allied powers—was a useful way to get rid of Nazi rule, and to safeguard the emergence of a democratic Germany without burdening the occupying powers with all the responsibilities of sovereignty. This is like the law of colonial occupation that emerged in the late-19th century to enable the colonial powers to rule over non-Europeans without the administrative burdens of formal sovereignty.[78]

Or think of the opposite case. From the end of the Second World War, until 1991, most of us dealt with the USSR as the territorial sovereign in the Baltic republics. I remember how striking it later in the 90's was to participate in a legal case in a Finnish court in late-1990's having to do with the enforcement of certain contracts made with Soviet authorities over assets situated in the Baltic republics. The Court held the contracts non-enforceable because they had been concluded by a military occupant.[79] What had looked like sovereignty from 1940 onwards, turned out suddenly (merely) occupation. The two notions had lost all of their defining factual or formal character; they now became a part of a discourse of political approval and disapproval.[80]

And then Iraq. To the surprise of some, the United States announced military occupation of Iraq, run by the Coalition Provisional Authority (CPA) in 2003. On June 28, 2004 direct rule of the CPA was ended and a new "sovereign and independent" Interim Government of Iraq assumed the full responsibility and authority of the state.[81] A transitional constitution came into effect two days later. But of course, the distinction between occupation and sovereignty was a line drawn in water, a distinction without a

[78] *See* my THE GENTLE CIVILIZER OF NATIONS. THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 112-178 (2001).

[79] SKOP v. Estonia, (Helsinki City Court No. 496, Jan. 21, 1998) *reported in* TARJA LÄNGSTRÖM, TRANSFORMATION IN RUSSIA AND INTERNATIONAL LAW 195 (2003).

[80] *See* Martti Koskenniemi & Marja Lehto, *La succession d'Etats dans l'éx-URSS, en ce qui concerne particulièrement les relations avec la Finlande*, XXXVIII ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 190-98 (1992).

[81] *See* http://www.iraqcoalition.org/ (last visited May 18, 2008).

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difference on the ground. Like the cases of Germany and the Baltic republics, it was a political choice, made in view of influencing external perceptions and supporting particular players in a struggle over the distribution of entitlements to rule. As the (formal) law of occupation breaks down in these situations, Western-led occupiers do not so much seek "alternative sources of legitimacy"[82] as they turn to the fluid vocabulary of "legitimacy" itself that would set aside the constraints felt by formal law.[83]

From the perspective of this ideology, it is both impossible and pointless to make a formal distinction between occupation and sovereignty. At best, they become markers on a sliding scale in forms of modern governance—one more stable than the other, but each geared to the same objectives. Against the functionalism of this new law, insisting on sovereignty (or indeed fighting occupation) will appear as an atavistic residue from some bygone nationalist ideology, identity politics, pre-modern myth, and explosive irrationalism to be cured by the civilizing ethos: weighing the interests and balancing the needs—the cool reasonableness of modern management.

VI. *The Limits of Management*

The turn from formal-legal distinctions to a pragmatic management of situations—from "government" to "governance"—is a strikingly obvious aspect of modern international law.[84] That turn is also evident in the efforts of the High Court to deal with targeted killings. Here nothing remains stable, no rule, criterion or status has formal power. Everything builds on the facts, and the facts are fluid and intangible. Is terrorism crime or warfare, and is the appropriate legal-conceptual frame of response to it law enforcement or armed conflict? That the Court moved in a wholly indeterminate gray zone is exemplified by its combination of the "international armed conflict" frame with its insistence that that the "fundamental principles of Israeli public law" were still

[82] Harris, *supra* note 71, at 37.

[83] For a critique, *see* my *Legitimacy, Rights and Ideology: Notes Towards a Critique of the New Moral Internationalism*, Associations. J. Legal & Soc. Theory 349 (2003).

[84] I have dealt with aspects of this e.g. in my Formalism, Fragmentation, Freedom. Kantian themes in Today's International Law, No Foundations. Journal of Extreme Legal Positivism 7 (4/2007), *available at* http://www.helsinki.fi/nofo/.

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applicable.[85] The problem peaked in the qualification of the targets: were suspected terrorists either combatants or civilians? Putting aside the somewhat stained third alternative of labelling them "illegal combatants," it opted for complexity: they were civilians but did not enjoy the protection civilians enjoyed when and for such time as they were "taking direct part in the hostilities." This standard, again, pointed to pragmatic behavioural interpretations and thumb-rules. Providing financial help or logistical support was different from driving a car or carrying ammunition. It all depends. In the end, a person may at different moments appear in a different light: legitimate target one day, constructing an explosive device in the kitchen, but no longer in the following morning making breakfast for the family.[86]

The unease with the Israeli court's turn to proportionality—as with that branch of humanitarian law *tout court*—relates to the manner in which it ends up projecting occupation as mundane government, the management of a complex society with antagonistic groups advancing contrasting interests. If it is for the Military Commander to balance these interests, then it might as well be the sovereign in the territory. And this is indeed suggested by the Court's extension of the Military Commander's and its own protective function from Israeli citizens inside Israel to those living in the settlements outside Israel[87]—what some regard as the "real controversy hovering over all the litigation."[88] Although the Court meticulously avoided any positive statement on the legality or the illegality of the settlements, its relatively unproblematic extension of the protective function of Israeli law to them—once again—blurred questions of formal status. For practical purposes the law protects them as if they were Israeli citizens living inside Israel. The feeling expressed by many commentators about the separation wall and at the heart of its treatment by the International Court of Justice that it was a "political" phenomenon, aimed at grasping new territory and regularizing a situation that ought to remain temporary rather than a practical devise to ensure Israeli "security" reflects this shifting between contrasting descriptions. "In itself" or "essentially," the wall is neither a political not a security phenomenon. It becomes such only once it is described from the perspective of some interest or preference.[89]

[85] *Targeted Killing, supra* note 23, ¶ 18.

[86] *See* the discussion of the different scenarios in *Targeted Killing, id.*, ¶¶ 29-40.

[87] *See especially Mara'abe v. The Prime Minister of Israel*, *supra* note 14, ¶¶ 21-40.

[88] Barak-Erez, *supra* note 44, at 548.

[89] *See also* the Israeli Court's discussion of the different factual bases of its decision in *Beit Sourik* and the International Court of Justice's decision in the *Wall* in *Mara'abe v. The Prime Minister of Israel*, *supra* note 14, ¶¶ 61-72.

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With the Israeli Court's treatment of it through the language of proportionality, it is being regularized as an anti-terrorism technique in a way that reaffirms Israeli authority over the occupied territory in apparently non-political terms. Indeed, the Court itself rejects the lawfulness of giving a political justification to it.[90] From the Palestinian side, however, "security" appears *and can only appear* as a pretense over a move to regularize and legitimate political authority over Palestinian populations.

This extension of Israeli jurisdiction in personal or functional terms to the settlers undermines the distinction between sovereignty and occupation in a way that is analogous to the late-19th and early 20th century systems of consular jurisdiction and Western extraterritoriality in the "Orient."[91] Instead of sovereignty, Israeli authorities exercise sovereign powers in a thoroughly functional way.[92] However, this cluster of powers approaches what in a domestic context would be regular, formal sovereignty. In the latter context, human rights bodies regularly conceive the realization of rights as contextual management. Out of a huge volume of jurisprudence, think of a case where persons lose their jobs owing to information disclosed of them by security services. Is that a violation? Well, according to the ECHR, the matter needs to be assessed taking all relevant circumstances into account.

> The Court recognises that the national authorities enjoy a margin of appreciation, the scope of which will depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved. In the instant case, the interest of the respondent State in protecting its national security must be balanced against the seriousness of the interference with the applicant's right to respect for his private life.[93]

And how is this different from the assessment of the powers of the Military Commander by the Israeli HCJ? In no way, it seems to me. It is precisely this wiping away of any formal distinction between sovereignty, occupation, and (illegal)

[90] *Beit Sourik*, *supra* note 1, ¶ 27.

[91] *See generally* Gerrit W. Gong, The Standard of Civilization in International Society (1984).

[92] Within the League of Nations' mandates system, the question of where sovereignty lay was soon resolved by thinking of it being "divided" between the three relevant entities: the mandate, the mandatory and the institutions of the League. *See* my The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960 172-74 (2001).

[93] Leander v. Sweden, 116 Eur. Ct. H. R. (Ser. A), ¶ 59 (1987).

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settlement—making them appear just factual contexts for balancing everybody's rights—that the turn to proportionality by the High Court achieves.

And why should one worry about the eroding distinction? Not out of any deference to the magic of such words as "sovereignty" or "occupation." But—let me suggest—out of concern for the implications of characterizing occupation in managerial terms as regular "government" and thus wiping out the sense of its exceptionality, the way in which the occupation itself, including the behavior of Israeli authorities as competent authorities, is felt as a violation. No doubt, this has been motivated by the humanitarian urge and the search to bring *de facto* power within the compass of the law to think of it in terms of "authority" instead of simple usurpation. But when this leads into placing trust on the public authorities of the occupying power, their ability to "balance" the rights and interests of everyone in a "proportionate" way, then, as Aeyal Gross has observed, it "plac[es] both occupier and occupied on a purportedly equal plane" that distorts the real imbalance pertaining between them and obscures the character of the relationship of power established and perpetuated by the occupation.[94] It not only fails to articulate but effectively makes it impossible for the Palestinian population to express their principal grievance, the denial of their (formal) sovereignty.

None of this is to say that there exists some miraculous way out of the kind of evaluation and choice to which "balancing" and "proportionality" refer. Recourse by the Israeli High Court to such language harks back to the difficulties of applying—even envisaging the application of—formal "rules" in complex situations such as the conflict between Israel and the Palestinians. Deformalization is of course known to have significant problems in the normal operation of legal systems: Among other things it undermines predictability and transfers political power from legislators to law-appliers, in practice judges. Still, it cannot be done away with without engendering the problems of over and under-inclusiveness that infect all rule-based decision-making. In national societies, the turn is often found acceptable, however, because constitutional standards and practices control the effects of such "judicalization" of politics. The overall legitimacy of the politico-legal system extends to the practice of using courts to balance rights and distribute resources between social groups. This

[94] Gross, *supra* note 50, at 1. It may be too much to say that "proportionality assumes an accountable democratic government committed to the collective good of its citizens," *id.* 17. But at least it assumes a relationship between public authorities and citizens that can be articulated in a *political* theory about allegiance that occupation as *de facto* power can never provide. Occupation, unlike politics, cannot found a polity.

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is not so in regard to the situation in the Occupied Territories, however. There, the absence of formal sovereignty undermines the legitimacy of judicial governance per se, and irrespectively of how "well" that governance is conducted.

Perhaps the nature of the problem could be clarified by a parallel. In a globalized world, there are innumerable situations in which *de facto* authority is exercised outside the formal frame of legislative sovereignty. In economic affairs, power and sovereignty have departed in the most radical way. The lives of millions are affected on a daily basis by decisions made by transnational companies concerning investment, operating conditions and the location of their activities. The effects of those activities have been subject to much criticism by activist groups around the world. As a result, the companies have begun to establish boards and committees that look into their operation, approving ethics codes, good governance practices and various recommendations for enhancing their acceptability among the consumers. These practices, it seems to me, are both welcome and inherently suspect in a way that is analogous to the Israeli Court's turn to proportionality, combined with the language of ethical vocation in which it has been written.

The operations of transnational companies are like military occupation inasmuch as both operate outside the logic of formal sovereignty. We are critical of them as they appear to undermine the freedom of the individuals and the self-determination of the collectivity in some way fundamentally different from if they were being subjected to the rule of the domestic sovereign. This is not to say that the sovereign could not also be a source for undermining freedom and self-determination. Of course it can. But the idea of people legislating for itself in a politically constituted republic, and with it, the distinction between power and authority, governance and government, occupation and sovereignty, is not itself undermined by the presence of tyrannical sovereigns—or, it has to be said, by benevolent occupiers. But it is undermined by the ethics committees of transnational companies or by the review of the actions of military authorities by the Israeli HCJ. This undermining is independent of how seriously the ethics committee or the Court takes its job, how conscientiously its members carry out their jobs. It is an undermining we recognize in enlightened absolutism, an undermining produced by the liquidity of modern law, manifested in the collapse of occupation into government, analogous to the innumerable contexts where populations large and small are subjected to power—benevolent or not—that comes from outside their homes and polities, that involve them only as objects of charity, but not as masters of their own lives.

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But law is not only about the management of conflicting interests. Of course, it may sometimes have to use the language of balancing and proportionality. But this should always take place with some embarrassment, like in the epilogue to *Beit Sourik*. Instead, it is about freedom. The vocabulary of freedom, however, is a vocabulary of struggle for legislative sovereignty, rules, status and all that. Of course, there are different concepts of freedom. Occupation law harks back on the view of freedom as absence of coercion by the occupying state. It is ignorant of the way in which self-determination and participation in political decision-making are *in themselves* forms of freedom. To provide for this, formal status and bright-line rules are needed: legislative sovereignty, citizenship, self-rule—the conditions of political community—and not the melancholy vocabulary of managerial calculation.[95] Sovereignty may be a house of atavistic sentiments, identity politics and all kinds of misrule. But so can occupation. As ideas of the good life, and frameworks for economic and political freedom, they are worlds apart.[96] A law that fails to recognize the radicality of this difference and pretends that it is all only a mater of calculating the pros and cons, a law that, in the words of the *Beit Sourik* judgment, thinks a zone of occupation can be a zone of reasonableness, is a law not possibly worth having.

[95] I have argued this at greater length in *Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization*, 8 THEORETICAL INQ. L. 9 (2007).

[96] Already to maintain this distinction, apart from other reasons, is sufficient to keep alive the debate about the illegality of the occupation, now continued for over 40 years, as suggested in Orna Ben-Naftali, Aeyal M. Gross, & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551 (2005).

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